Yeoh Cheng Han & Anor v PPH Resorts (Penang) Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–537 OF 2008
VAZEER ALAM MYDIN JC
12 OCTOBER 2010

Civil Procedure — Action — Disposal of action without trial — Disposal of case based on pleadings and affidavits — Whether defendant was housing developer — Whether agreement for sale of land and construction of house two separate agreements — Whether defendant as housing developer contravened provisions of Housing Developers (Control and Licensing) Act 1966 — Whether defendant entitled to terminate sale and purchase agreement — Whether plaintiffs entitled to specific performance — Whether plaintiffs' claim time barred — Housing Developers (Control and Licensing) Act 1966 s 3 — Housing Developments (Control and Licensing Regulations 1989) Schedule G — Rules of the High Court 1980 O 14A & O 33

The defendant, which was at all material times the registered owner of two lots of land situated in Pulau Pinang ('the project land'), was granted planning permission to develop the project land into an integrated housing, commercial and recreational development. The defendant entered into a sale and purchase agreement ('the SPA') to sell one of the plots of project land identified as Plot No 88 ('the land') to Yeoh Cheng Han and Loh Ah Heoh ('the plaintiffs') at the price of RM591,150. The SPA also contained an agreement wherein the defendant was appointed as the plaintiffs' contractor to construct a bungalow house ('the bungalow') upon the land at an all-inclusive construction price of RM1,138,900. Thus, the total purchase price of the land and bungalow was RM1,730,050. Under the terms of the SPA the plaintiffs were required to pay 15% of the cost of the land and 10% of the fee for the construction of the bungalow ('construction fee') immediately upon the execution of the SPA ('the initial costs'). The balance of the construction fee and the land cost were to be paid progressively as provided in the SPA. Although the plaintiffs had settled the initial costs, the defendant had neither completed the earthworks and infrastructure for the development nor commenced construction of the bungalow. Therefore, when the defendant claimed a further sum of RM354,690 from the plaintiffs as progressive payment, the latter refused to pay. Instead, the plaintiffs argued that the defendant was not entitled to any further payment from the plaintiffs as the schedule of payment in the SPA contravened Schedule G of the Housing Developers (Control and Licensing) Act 1966 ('the Act'). The plaintiffs also claimed that as the defendant had breached the terms of the SPA by its failure to complete and deliver vacant possession of the bungalow within the stipulated time the plaintiffs were

entitled to liquidated damages of RM1,629,090.92 as at 28 May 2008. The plaintiffs thus issued a notice of demand to the defendant demanding that the defendant deliver vacant possession of the bungalow to the plaintiffs within two weeks from 2 June 2008 and settle the liquidated damages due to the plaintiffs. When the defendant refused to comply with the terms of the said notice of demand the plaintiffs commenced an action against the defendant. In their claim the plaintiffs averred that the defendant was a housing developer within the meaning of the Act and that the SPA had to conform to the provisions of the Act. By way of this action the plaintiffs prayed for, inter alia, a declaration that the defendant was housing developer and that as a housing developer it had contravened the provisions of the Act; a declaration that the defendant could not terminate the SPA; specific performance of the SPA or damages in lieu of specific performance; liquidated damages from the date the bungalow ought to have been completed until the date of delivery of vacant possession; interest and costs. The defendant on the other hand claimed that the SPA had been terminated by virtue of the plaintiffs' non-payment of the sum of RM354,690, which was due and payable under the terms of SPA. The plaintiffs then filed the instant application under O 14A and/or under O 33(2) of the Rules of the High Court 1980 for the present action to be determined based on the pleadings and affidavits filed in support. The main issue to be determined in this application, which would essentially determine all the other issues to be considered in this case, was whether the defendant was a housing developer under the Act.

Held, allowing the plaintiff's application with costs:

(1) It was abundantly clear from the planning permission granted to the defendant that it was embarking on a development to construct more than four units of residential accommodation and would thus be caught under the first limb of the definition of housing developer as stipulated in s 3 of the Act. The letter from the consultant engineer for the development project supported the plaintiffs' contention that the sale and construction of the bungalow was not an isolated one off sale but part of a larger residential development containing more than four units. In fact cl 14 of the SPA provided that the bungalow lot formed part of the whole of the project land. All the facts and circumstances pointed to the irresistible conclusion that the defendant was a housing developer and that as such it ought to have applied for and obtained the necessary licences to sell residential units to the public. The defendant could not rely on its own transgression as a defence to the plaintiffs' claim (see paras 33, 35 & 39).

(2) Although the defendant argued that there were two separate agreements in the SPA it is settled law that even in situations where there were two separate agreements drawn up, ie one in respect of the sale of the land and the other for the construction of the house, the courts had in construing

the agreements in totality held the vendor/contractor to be a developer within the meaning of s 3 of the Act. In any event, in the present case the agreement to sell the land and the agreement to construct the housing unit were not distinct and could not be severed. As the defendant had agreed to sell the land, which was registered in its name, and to build the bungalow on the land, the plaintiff had entered into one agreement and not two separate agreements. The land owner and the contractor were the same entity/party and the plaintiffs would get to own the land and bungalow only when they paid for the price of the land and the bungalow to the defendant. Thus the defendant was a housing developer within the meaning of s 3 of the Act (see paras 37, 40 & 42–43).

(3) The subtle difference created by the defendant to clothe and guise the mechanism of sale in such a manner as to avoid the provisions and requirements of the Act amounted to a scheme of avoidance. In fact such avoidance schemes would be clearly caught out under the post 2002 amendment to s 3 of the Act (see para 41).

(4) It is trite law that if an entity is construed as a housing developer within the Act, then the provisions of the Act and the Housing Developers (Control and Licensing) Regulations 1989 are applicable to it. Therefore, in the instant case the SPA must be read subject to the provisions of the Act and Regulations. Since the provisions of the SPA in relation to the bearing of the costs of infrastructure and the schedule of payment in the SPA were inconsistent with Schedule G of the Act, the defendant could not rely on the payment schedule clauses in the SPA. The defendant in effect was not entitled to any further progressive payment because until 2004 it had not complied with its obligations under the law and could not terminate the agreement on the basis of the plaintiffs' non-payment of the progressive payment (see paras 44, 47–48 & 50).

(5) The plaintiffs were entitled in law to seek specific performance of the SPA. Those clauses in the SPA which were in contravention with the statute should not form part of the contract between the defendant and the plaintiffs and such clauses ought to be substituted with the statutorily sanctioned terms, as contained in the Act (see para 53).

(6) As the plaintiffs' claim in this case was not for damages alone but, inter alia, for specific performance of the sale of the land, the limitation period was 12 years. The plaintiffs' claim in the present case was not time barred (see para 54).

[Bahasa Malaysia summary

Defendan, yang mana pada setiap masa matan merupakan pemilik berdaftar dua lot tanah yang terletak di Pulau Pinang ('projek tanah tersebut') telah diberikan kebenaran perancangan untuk memajukan projek tanah tersebut menjadi perumahan berintegrasi, pembangunan komersial dan rekreasi.

Defendan telah memasuki perjanjian jual beli ('PJB') untuk menjual salah satu plot projek tanah yang dikenali sebagai Plot No 88 ('tanah tersebut') kepada Yeoh Cheng Han dan Loh Ah Heoh ('plaintif-plaintif') dengan harga RM591,150. PJB tersebut juga mengandungi perjanjian di mana defendan telah melantik kontraktor plaintif-plaintif untuk membina rumah banglo di atas tanah tersebut pada harga pembinaan menyeluruh sebanyak RM1,138,900. Oleh itu, jumlah harga belian tanah dan banglo tersebut adalah RM1,730,050. Di bawah terma-terma PJB tersebut plaintif-plaintif dikehendaki membayar 15% daripada kos tanah tersebut dan 10% fi bagi pembinaan banglo ('fi pembinaan') serta-merta sesudah PJB ditandatangani ('kos permulaan'). Baki fi pembinaan dan kos tanah seharusnya dibayar secara progresif seperti yang diperuntukkan di dalam PJB. Walaupun plaintif-plaintif telah menyelesaikan kos permulaan tersebut, defendan tidak menyempurnakan kerja tanah dan infrastruktur bagi pembangunan tersebut ataupun memulakan pembinaan banglo tersebut. Oleh itu, apabila defendan selanjutnya menuntut jumlah sebanyak RM354,690 daripada plaintif-plaintif sebagai bayaran progresif, plaintif-plaintif enggan membayarnya. Sebaliknya, plaintif-plaintif berhujah bahawa defendan tidak berhak menerima sebarang bayaran daripada plaintif-plaintif memandangkan jadual pembayaran di dalam PJB bercanggah dengan Jadual G Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta tersebut'). Plaintif-plaintif juga mendakwa bahawa memandangkan defendan telah melanggar terma-terma PJB dengan gagal untuk menyempurna dan menyampaikan milikan kosong banglo dalam masa yang ditetapkan, plaintif-plaintif berhak terhadap ganti rugi jumlah tertentu sebanyak RM1,629,090.92 pada 28 Mei 2008. Plaintif-plaintif oleh itu telah mengeluarkan notis tuntutan kepada defendan menuntut defendan menyampaikan milikan kosong banglo kepada plaintif-plaintif dalam tempoh dua minggu dari 2 Jun 2008 dan menyelesaikan ganti rugi jumlah tertentu yang tertunggak kepada plaintif-plaintif. Apabila defendan enggan patuh dengan terma-terma notis tuntutan, plaintif-plaintif memulakan tindakan terhadap defendan. Dalam tuntutan mereka plaintif-plaintif menegaskan bahawa defendan merupakan pemaju perumahan mengikut maksud Akta dan bahawa PJB hendaklah menurut peruntukan Akta tersebut. Melalui tindakan ini, plaintif-plaintif memohon untuk, antara lain, deklarasi bahawa defendan adalah pemaju perumahan dan sebagai pemaju perumahan, ia telah bercanggah dengan peruntukan Akta tersebut; deklarasi bahawa defendan tidak boleh menamatkan PJB tersebut; pelaksanaan spesifik PJB atau ganti rugi sebagai ganti pelaksanaan spesifik tersebut; ganti rugi jumlah tertentu dari tarikh banglo tersebut seharusnya disempurnakan sehingga tarikh penyampaian milikan kosong; faedah dan kos. Defendan pula mendakwa bahawa PJB telah tamat berikutan jumlah sebanyak RM354,690 yang tidak dibayar oleh plaintif-plaintif, yang mana tertunggak dan harus dibayar di bawah terma-terma PJB tersebut. Plantif-plaintif kemudiannya memfail permohonan ini di bawah A 14A dan/atau A 33(2) Kaedah-Kaedah Mahkamah Tinggi 1980 bagi tindakan ini untuk ditentukan berdasarkan

kepada pliding-pliding dan afidavit-afidavit yang difailkan sebagai sokongan. Isu utama untuk diputuskan di dalam permohonan ini yang mana sangat perlu bagi menentukan kesemua isu yang lain bagi pertimbangan di dalam kes ini, adalah sama ada defendan adalah pemaju perumahan di bawah Akta.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Adalah amat jelas daripada kebenaran perancangan yang diberikan kepada defendan bahawa ia sedang memulakan pembangunan untuk membina lebih daripada empat unit tempat kediaman dan oleh itu, adalah terangkum di bawah cabang pertama bagi definisi pemaju perumahan seperti yang diperuntukkan di dalam s 3 Akta tersebut. Surat daripada penasihat jurutera untuk pembangunan projek menyokong dakwaan plaintif-plaintif bahawa jualan dan pembinaan banglo tersebut bukanlah jualan sekaligus berasingan tetapi adalah sebahagian pembangunan kediaman yang lebih besar yang mengandungi lebih daripada empat unit. Malahan, klausa 14 PJB memperuntukkan bahawa lot banglo tersebut membentuk sebahagian daripada keseluruhan projek tanah tersebut. Kesemua fakta dan keadaan membawa kepada kesimpulan yang kukuh bahawa defendan adalah pemaju perumahan dan oleh itu seharusnya memohon dan mendapatkan lesen-lesen sepatutnya untuk menjual unit-unit kediaman kepada orang awam. Defendan tidak boleh bersandarkan kepada pelanggarannya sendiri sebagai pembelaan bagi tuntutan plaintif-plaintif (lihat perenggan 33, 35 & 39).

(2) Walaupun defendan menegaskan bahawa terdapat dua perjanjian berasingan di dalam PJB, adalah menjadi undang-undang tetap bahawa meskipun di dalam keadaan di mana dua perjanjian berasingan telah dibuat, iaitu satu berkaitan dengan penjualan tanah dan lagi satu untuk pembinaan rumah, mahkamah-mahkamah telah, dalam mentafsir perjanjian-perjanjian tersebut secara keseluruhan memutuskan penjual/kontraktor merupakan pemaju dalam maksud s 3 Akta tersebut. Dalam apa-apa kejadian, dalam kes ini, perjanjian untuk menjual tanah tersebut dan perjanjian untuk membina unit perumahan bukanlah berlainan dan tidak boleh diasingkan. Memandangkan defendan telah bersetuju untuk menjual tanah tersebut, yang mana telah didaftarkan di atas namanya, dan untuk membina banglo di atas tanah tersebut, plaintif-plaintif telah memasuki satu perjanjian dan bukan dua perjanjian yang berasingan. Pemilik tanah dan kontraktor tersebut merupakan entiti/pihak yang sama dan plaintif-plaintif hanya boleh memiliki tanah dan banglo itu apabila mereka telah membayar untuk harga tanah dan banglo kepada defendan. Justeru, defendan adalah pemaju perumahan dalam maksud s 3 Akta tersebut (lihat perenggan 37, 40 & 42–43).

(3) Perbezaan tidak ketara yang diwujudkan oleh defendan untuk melindungi dan menopeng mekanisma jualan dalam cara untuk mengelak peruntukan dan keperluan Akta membawa kepada rancangan untuk penghindaran. Malahan rancangan untuk penghindaran tersebut dengan jelas terangkum di bawah pindaan selepas 2002 bagi s 3 Akta tersebut (lihat perenggan 41).

(4) Adalah menjadi undang-undang nyata bahawa jika suatu entiti ditafsir sebagai pemaju perumahan mengikut Akta, oleh itu peruntukan Akta dan Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1989 adalah terpakai ke atasnya. Oleh demikian, dalam kes ini, PJB hendaklah dibaca tertakluk kepada peruntukan Akta dan Peraturan-Peraturan tersebut. Memandangkan peruntukan PJB berkenaan dengan kos infrastruktur yang harus ditanggung dan jadual pembayaran di dalam PJB adalah tidak konsisten dengan Jadual G Akta, defendan tidak boleh bergantung kepada klausa-klausa jadual pembayaran di dalam PJB. Sebagai akibat defendan tidak berhak untuk apa-apa bayaran progresif selanjutnya oleh kerana sehingga 2004, ia tidak mematuhi kewajipannya di bawah undang-undang dan tidak boleh menamatkan perjanjian atas dasar plaintif tidak membayar bayaran progresif tersebut (lihat perenggan 44, 47–48 & 50).

(5) Plaintif-plaintif adalah berhak di sisi undang-undang untuk meminta pelaksanaan spesifik PJB tersebut. Klausa-klausa di dalam PJB yang mana bercanggah dengan statut tidak seharusnya membentuk sebahagian kontrak tersebut di antara defendan dan plaintif-plaintif dan klausa-klausa tersebut seharusnya digantikan dengan terma-terma yang disanksi menurut statut, seperti yang terkandung di dalam Akta tersebut (lihat perenggan 53).

(6) Memandangkan tuntutan plaintif-plaintif di dalam kes ini bukan untuk ganti rugi semata-mata, tetapi, antara lain, untuk pelaksanaan spesifik bagi jualan tanah tersebut, tempoh batasan adalah 12 tahun. Tuntutan plaintif-plaintif dalam kes ini tidak dihadkan oleh masa (lihat perenggan 54).]

Notes

For cases on disposal of action without trial, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 139–168.

Cases referred to

Alghussein Establishment v Eton College [1991] 1 All ER 267, HL (refd)

Ayer Itam Height Sdn Bhd & Ors v Chung Nyuk Sen @ Henry Chung [2003] 2 MLJ 481; [2003] 2 CLJ 685, CA (folld)

Cheong Soo Leong & Ors v H'ng Ah Ba [2004] 2 CLJ 19, CA (refd)

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285, FC (folld)
Danaharta Managers Sdn Bhd v Melewar Leisure Sdn Bhd & Ors [2008] 4 MLJ 448, HC (folld)
Energoprojek (M) Holdings v Public Prosecutor [1998] 5 MLJ 40, HC (refd)
Everett v Ribbands and another [1952] 1 All ER 823, CA (folld)
Khau Daw Yau v Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335, HC (refd)
MK Retnam Holdings Sdn Bhd v Bhagat Singh [1985] 2 MLJ 212, SC (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Padang Serai Kilang Kayu Bhd v Khor Kia Fong & Ors [1998] 1 MLJ 589, HC (refd)
Penguasa (Jabatan Tanah & Survei, Bintulu) & Ors v Amit bin Salleh & Ors [2008] 4 MLJ 567, CA (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (folld)
SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31, FC (refd)
Tan Ching Choong & Ors v Ekabina Sdn Bhd & Ors [2002] 5 MLJ 654, HC (folld)
Tan Swee Lan v Engku Nik binti Engku Muda & Ors [1973] 2 MLJ 187, FC (refd)

Legislation referred to

Housing Developers (Control and Licensing) Act 1966 ss 3, 5
Housing Developers (Control and Licensing) Regulations 1989 reg 11(1), Schedule G, Third Schedule
Housing Developers (Control and Licensing) Rules 1970
Limitation Act 1953 s 9
Rules of the High Court 1980 O 14A, O 32, O 33 r 2
Town and Country Planning Act 1976 s 22(3)

Karin Lim (A Suppiah with her) (Presgrave & Matthews) for the plaintiffs.
KH Teh (BC Teh & Yeoh) for the defendant.

Vazeer Alam Mydin JC:

[1] The plaintiffs' application (encl 6) is under O 14A and/or under O 33 r 2 of the RHC 1980 and/or under the inherent jurisdiction of this court to determine the following issues based on the pleadings, documents referred to in the pleadings and the affidavits filed herein:

(a) whether the defendant is a housing developer;

(b) whether the defendant is subject to the provisions under the Housing Developers (Control and Licensing) Act 1966 ('the 1966 Act') in relation

to the sale and purchase agreement ('S & P') dated 29 December 1996 entered into between the defendant as the vendor of the one part and the plaintiffs as the purchasers of the other part;

(c) whether the defendant has breached any of its obligations under the 1966 Act when it failed to complete and deliver the bungalow which had to be constructed for the plaintiffs, pursuant to the provisions of the 1966 Act;

(d) whether the defendant is entitled to terminate the S & P;

(e) whether any notice had been sent by the defendant to terminate the said S & P and if it had sent, whether the said notice is wrong in law, pre-mature and null and void; and

(f) whether the plaintiffs are entitled to specific performance of the said S & P with the terms therein substituted in accordance with Schedule G of the Housing Developers (Control and Licensing) Regulations 1989 ('1989 Regulations').

[2] That in the event the above said questions/issues are resolved in favour of the plaintiffs, final judgment be entered against the defendant for the reliefs as prayed for in the statement of claim of the plaintiffs, that is:

(a) a declaration that the defendant is a housing developer and bound by the provisions of the 1966 Act;

(b) a declaration that the defendant has contravened the provisions of the 1966 Act;

(c) a declaration that the defendant is not entitled to terminate the S & P dated 29 December 1996 for any reason whatsoever;

(d) specific performance of the S & P dated 29 December 1996 with the terms therein substituted in accordance with Schedule G of the 1989 Regulations;

(e) alternatively, damages in lieu of specific performance;

(f) a declaration that the plaintiffs are entitled to liquidated damages as prescribed by cl 20(2) of Schedule G of the 1989 Regulations from the date the bungalow ought to have been completed until the date of delivery of vacant possession thereof;

(g) an order that the plaintiffs are entitled to set off the amount due to the defendant, if any, from the liquidated damages due from the defendant to the plaintiffs;

(h) an order that the defendant do transfer the title to the bungalow lot (Lot No 12011 Suratan Hakmilik Sementara No HS(D) 14338, Mukim 12, Daerah Barat Daya, Pulau Pinang ('the said property') to the plaintiffs and cause the same to be registered in the name of the plaintiffs;

(i) an order that the defendant deliver the title to the said property with all encumbrances thereon discharged together with all the other relevant documents to enable the plaintiffs to register the transfer of the said property into their name;

(j) an order that if the defendant fails or refuses to execute the memorandum of transfer or any other document for the purpose of transferring the said property to the plaintiffs, the senior assistant registrar of the High Court at Penang is authorised to execute the relevant documents to give to effect the transfer into the name of the plaintiffs;

(k) an order that the registrar of land titles or any other relevant authority give effect to this order and register the transfer of the title into the name of the plaintiffs;

(l) an order that the caveat filed by the plaintiffs (Presentation No 11506/2004 dated 12 July 2004) is extended until the disposal of this suit;

(m) interest at the rate of 10% on the amount due to the plaintiffs from the defendant;

(n) costs, and

(o) further or other reliefs as deemed fit and proper by this honourable court.

[3] The plaintiffs' application is supported by an affidavit affirmed by Yeoh Cheng Han on 17 June 2009 (encl 7). Other affidavits filed in relation to encl 6 are as follows:

(a) *Afidavit jawapan defendan* (I) affirmed by Tan Swee Leong on 17 August 2009 (encl 8).

(b) *Afidavit balasan* affirmed by Yeoh Cheng Han on 2 February 2010 (encl 9).

(c) *Afidavit jawapan defendan* (II) affirmed by Tan Kok Siang on 26 March 2010 (encl 10).

(d) *Afidavit balasan* affirmed by Yeoh Cheng Han on 21 May 2010 (encl 11).

(e) *Afidavit jawapan defendan* (III) affirmed by Tan Kok Siang on 3 June 2010 (encl 12).

THE BACKGROUND FACTS

[4] The defendant is the registered owner of the parcels of land known as Lot Nos 8134 and 5791, Mukim 12, Daerah Barat Daya, Pulau Pinang ('project land'). The Majlis Perbandaran Pulau Pinang ('MPPP') had on 14 April 1995 granted the defendant planning permission under s 22(3) of the Town and

Country Planning Act 1976 ('planning permission') to build on the project land a 18 hole golf course, four storey club house, 14 storey hotel with two levels of basement car park (380 rooms), three blocks of 14/15 storey RM25,000 low cost apartments (1000 units), four blocks of 9, 11, 12 storey apartments (390 units), 50 units single storey terrace houses, 88 plots of land for bungalows, 12 units three storey shop houses, one site for a school together with all other ancillary amenities as shown in the approved plan annexed as exh YCH13 of encl 11 ('master plan'). It is pertinent to note that the defendant is referred to as 'pemaju' in the said planning permission dated 14 April 1995.

[5] A sale and purchase agreement (S & P) dated 29 December 1996 was entered into between the defendant as the vendor and the plaintiffs as the purchasers (exh YCH1 in encl 7) for the sale and purchase of one of the 88 plots of bungalow land comprised in the project identified as Plot No 68 ('the land') together with the infrastructure and the enjoyment of the services and privileges as defined in Appendix 6 to the S & P (cl 3 of the recital to S & P) at the price of RM591,150.

[6] The S & P also contained an agreement for the simultaneous appointment by the plaintiff of the defendant as the contractor to construct a bungalow house ('bungalow') upon the terms and conditions contained in the S & P at the all inclusive construction price of RM1,138,900 as stipulated in Appendix 3 to the S & P. Therefore, the total purchase price for the land and bungalow (that is cost of land and construction cost) is RM1,730,050 (cl 3 of the recital and section 5 of Appendix 1).

[7] Pursuant to the terms of the S & P the payments for the land and the bungalow were to be paid periodically in accordance to schedule of payment in Appendix 2 for the land and in Appendix 3 for the bungalow. The sum of RM88,672.50 which is 15% of the cost of land had to be paid immediately upon signing of the S & P. The plaintiffs have settled the said sum of RM88,672.50. Further, pursuant to the schedule, the plaintiffs were required to pay RM113,890 being the 10% of the construction fee/cost immediately upon the execution of the S & P (cl 4 of recital to S & P). The Plaintiffs have settled the said sum of RM113,890. Therefore, the plaintiffs have paid the defendant the sum totaling RM202,562.50 and the defendant has acknowledged receipt of the said sum vide a statement of account (exh YCH2 in encl 7).

[8] The balance of the construction fee/cost and the land cost is to be paid progressively as provided for in Appendices 2 and 3 within 14 days from the receipt by the plaintiffs of the request of payment accompanied by a certificate signed by the project engineer and/or architect stating that the commencement

or completion of a pertinent milestone in the construction of the bungalow as stipulated in the Appendices 2 and 3 has been done or achieved.

[9] The defendant was under the terms of the S & P required to submit within one year from the date of the S & P the necessary building plans annexed to the S & P on behalf of the plaintiffs for the construction of a building. The building plans had been drawn up by the defendant's architects and the consultant engineer was to be appointed by the defendant.

[10] The defendant is required to deliver vacant possession of the bungalow lot together with the bungalow duly constructed as agreed, free from all encumbrances together with the infrastructures fully within 36 months from the approval of the building plans and all other connected plans failing which the plaintiffs shall be entitled to liquidated damages at the rate of 12%pa of the total amount of the purchase price and the construction fee paid by the plaintiffs until actual delivery of vacant possession of the bungalow lot together with the said bungalow and the infrastructures fully completed connecting and servicing the bungalow lot (cl 22 of the S & P).

[11] By way of a letter dated 24 June 1997, the defendant informed the plaintiffs that earthworks for the roads fronting the bungalow lots had commenced and were continuing (exh YCH4 in encl 7).

[12] Then, by way of a letter dated 12 March 2002 the defendant informed the plaintiffs that the bulk of the earthworks for the development as a whole were still going on at the Level 1 area of the overall development which is the level where the plaintiffs' Plot No 68 is situated and that the works were expected to be completed by August 2002 (exh YCH5 in encl 7).

[13] Then, vide letter dated 30 April 2002 the defendant informed the plaintiffs that the earthworks for the development was more than 60% completed and that they would commence construction of the bungalows and infrastructure within Level 1 in October 2002 and the handover of the plaintiffs' bungalow unit was expected to be in May 2004 (exh YCH6 in encl 7).

[14] The defendant's letter dated 10 October 2002 to the plaintiffs' solicitors states, inter alia, that 'the progress of the construction to date is commencement of earthworks for roads fronting the above bungalow lots and are continuing at site' (exh YCH7 in encl 7).

[15] By way of a letter dated 31 May 2004, the defendant informed the plaintiffs that the earthworks for the plaintiffs' Plot No 68 has been completed and the construction of road and drainage fronting the said plot had commenced (exh YCH8 in encl 7).

[16] After the date of the said letter dated 31 May 2004, the defendant did not commence construction of the plaintiffs' bungalow. The plaintiffs state that before the defendant is entitled to collect any further sum from the plaintiffs, the defendant ought to obtain the approval for the building plans and ought to prepare the infrastructure at its own costs. The plaintiffs argue that since the defendant had not completed the earthworks, the defendant is not entitled to any further payment from the plaintiffs under the law.

[17] Vide a letter dated 11 August 2004, the defendant wanted the plaintiffs to settle the sum of RM354,690 which the defendant claims is due from the plaintiffs pursuant to the S & P and unequivocally threatened to terminate the S & P if the plaintiffs did not settle the said sum of RM354,690 (exh YCH10 in encl 10). The plaintiffs refused to pay on the grounds that the schedule of payment in the S & P contravenes that of Schedule G in the 1989 Regulations.

[18] The plaintiffs argue that the defendant is a housing developer within the meaning of the 1966 Act and therefore the S & P must conform to the provisions and requirements of the 1966 Act. The plaintiffs state that they are ready, able and willing to settle the purchase price in accordance with Schedule G of the 1989 Regulations. However, since, until October 2004 the defendant had not completed the earthworks and infrastructure for the said project let alone the construction of the bungalow. Therefore, the plaintiffs argue that, no payments are due and payable in accordance to Schedule G of the 1989 Regulations. The plaintiffs have taken the stand that they are not liable to make any further payments in accordance to the provisions of S & P which contravenes the 1966 Act.

[19] The defendant on the other hand claims that the S & P had been terminated by virtue of the plaintiffs' non-payment of the sum of RM354,690 as demanded in their letter dated 11 August 2004.

[20] The plaintiffs submit that the defendant has breached the terms of the said S & P and has failed to complete and deliver vacant possession of the bungalow although more than 24 months had lapsed from the date of the said agreement. In this regard, the plaintiffs claim that liquidated damages payable by the defendant to the plaintiffs is RM1,629,090.92 as at 28 May 2008. Liquidated damages is according to the plaintiffs continuing to accrue as the

defendant had failed to deliver vacant possession of the bungalow to the plaintiffs together with the infrastructure completed and connected with services to the said bungalow/project.

[21] The plaintiffs have, through their solicitors, issued a notice of demand dated 2 June 2008 to the defendant to demand that the defendant complete and deliver vacant possession of the said bungalow and effect transfer of the said bungalow within two weeks from 2 June 2008 and settle the liquidated damages due to the plaintiffs (exh YCH11 in encl 7).

[22] Vide the said notice the plaintiffs had also informed the defendant that they are entitled to set off the amount payable by them to the defendant, if any, from the liquidated damages of RM1,629,090.92 as at 28 May 2008. The defendant has refused to comply with the terms of the said notice of demand. The defendant has admitted that it had received the said notice of demand.

ISSUES FOR DETERMINATION

[23] The central issue for determination is whether the defendant is a housing developer under the 1966 Act. The answer to this issue would essentially determine the answers to the rest of the questions posed to this court.

[24] Order 14A provides that the court may at any stage of the proceedings, where it appears that the question of law is suitable for determination without full trial of the action and where such determination will finally determine the entire cause or matter, hear the application and dispose of the case on a point of law. Order 14A empowers the court to make a final determination of a question of law without the need for a trial.

[25] Further O 33 r 2 of the RHC 1980 provides that the court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[26] I am guided by the opinion of Rohana J in *Danaharta Managers Sdn Bhd v Melewar Leisure Sdn Bhd & Ors* [2008] 4 MLJ 448 Rohana Yusuf J where she held that:

> In deliberating on an application under O 14 of the RHC, the court needs to only be satisfied whether or not the defendant had raised any sustainable defence which deserves a trial. *Whereas, under O 14A of the RHC the court will determine the issues of law upon the construction of documents whenever it appears to the court that the*

determination of any question of law will lead to a final conclusion of the action because there are no facts in dispute. (Emphasis added).

[27] In *Tan Ching Choong & Ors v Ekabina Sdn Bhd & Ors* [2002] 5 MLJ 654 Arifin Zakaria J (now CJ (Malaya) held that:

The question posed by the defendants, if decided in their favour, would bring an end to this suit. This would save costs and time, which would otherwise be expended to deal with other issues of the case. On this premise, the defendants' application was allowed.

[28] In *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337 Mohd Noor Ahmad JCA speaking for the Court of Appeal held that:

The core or primary issue is contained in the first three questions posed in the respective application … Therefore, the determination of the threshold issue as preliminary issues will be decisive of the whole litigation or essentially the main part of the suit. Thus, resulting in a substantial saving of time and cost as it will significantly cut down the costs and time involved in pre-trial preparation or in connection with the trial proper.

[29] Similarly in *Ayer Itam Height Sdn Bhd & Ors v Chung Nyuk Sen @ Henry Chung* [2003] 2 MLJ 481; [2003] 2 CLJ 685 Mohd Saari Yusof JCA speaking for the Court of Appeal held with approval the following dicta from *Everett v Ribbands and another* [1952] 1 All ER 823:

where there is a point of law which, if decided in one way, is going to be decisive of the litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of pleadings or very shortly afterwards.

[30] Following and applying the legal principles enunciated in the above cases I am of the view that this is a fit and proper case for me to use O 14A and/or O 32 of the RHC to determine the core issues as posed in the questions to the court in encl 6.

[31] The central issue for determination is whether the defendant is a housing developer under the 1966 Act. According to s 3 of the 1966 (prior to the amendment in 2002 and as it was at the material time when the S & P was executed), the definition of 'housing developer' and 'housing development' is as follows:

'housing developer'	means any person, body of persons, company, firm or society (by whatever name described), who or which engages in or carries on or undertakes or causes to be undertaken a housing development
'housing development'	means *to develop or construct or cause to be constructed in any manner whatsoever more than four units of housing accommodation* and includes the collection of moneys or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; *or the sale of more than four lots of land or building lots with the view of constructing more than four units of housing accommodation*.

[32] In this case, the defendant had submitted application for planning permission to develop the aforementioned Lots 8134 and 5719 into an integrated housing, commercial and recreational development (exh YCH13 in encl 11). The planning permission granted is for the construction and erection of a golf club, four storey club house, a 14 storey hotel, three blocks of 14/15 storey low cost apartments, four blocks of 9, 11, 15 storey apartments, 15 units of terrace houses, 88 plots of bungalows, 12 units of three storey shop houses and other facilities as shown in the plans.

[33] The planning approval authority, namely the Majlis Perbandaran Pulau Pinang had in fact referred to the defendant as 'pemaju' in the conditions attached to the planning permission in the following terms:

> (iii) Tapak kawasan lapang 'linear park' hendaklah dilanskap sebagai 'Taman Masyarakat' mengikut pelan landskap yang hendak disediakan oleh *pemaju* dan diluluskan oleh Majlis dan dipindahmilik kepada Majlis dengan harga namaan RM1.00 satu plot sebelum Sijil Penhunian diberikan.

Further condition (xv) of the planning permission states:

> (xv) Unit-unit perumahan kos rendah RM25,000/– seunit hendaklah dijual mengikut dasar Kerajaan Negeri dan kerja-kerja hendaklah dijalankan serentak dan Sijil Penghunian dikeluarkan serentak dengan pemajuan perumahan jenis lain.

Therefore, the planning permission clearly envisages the development of the low cost residential units to be done simultaneously with the development of the rest of the residential units in the development scheme, which would include the bungalows. It is also clear from the planning permission that there

are 1,000 units of low cost apartments and 50 single storey terrace houses to be built. Therefore, it is abundantly clear that the defendant is embarking on a development to construct more than four units of residential accommodation and would be caught under the first limb of the definition of housing developer as stipulated in s 3 of the 1966 Act.

[34] The S & P is for the sale of land (being one of the 88 bungalow plots) and also for the construction of a bungalow by the defendant within the larger development. The building plan as in exh TSL1 of the defendant's affidavit dated 17 August 2009 had been submitted for the construction of a two storey bungalow for the plaintiffs by the defendant. In the said building plan, the defendant is named as the owner of the land.

[35] The consultant engineer for the development project Messrs K & K Consulting Engineers had by way of letter addressed to the defendant dated 27 May 2004 and captioned 'Cadangan Pembangunan 88 Buah Bungalow 2–4 Tingkat Di Atas Lot 8134, Mukim 12, Daerah Barat Daya, Jalan Relau, Pulau Pinang untuk Tetuan PPH Resorts (Penang)' (exh YCH8 in encl 7) confirmed that the earthworks for the plaintiffs' Plot 68 together with 20 other bungalow lots had been completed. This letter again evidences and supports the plaintiffs' contention that the sale and construction of the bungalow as in the S & P is not an isolated one off sale but is part of a larger residential development containing more than four units. In fact cl 14 of the S & P states that the 'Bungalow Lot forms part of the whole of the Project Land'.

[36] In *Cheong Soo Leong & Ors v H'ng Ah Ba* [2004] 2 CLJ 19, the respondent had entered into a sale and purchase agreement with the appellants for a piece of land owned by them. Subsequently, the respondent entered into a second agreement wherein the appellants agreed to build a single storey semi-detached house on the land for the respondent. In that case the court held that the defendants had embarked on a project to develop 75 units of houses including the plaintiff's house. Though the sale of the land and the contract to build the house were done through two separate agreements, the Court of Appeal in affirming the decision of the High Court held that the defendants were not ordinary contractors engaged to build houses for individuals but housing developers within the context of s 3 of the 1966 Act.

[37] So even in a situation where two separate agreements were drawn up, one for the sale of the land and the other for the construction of a house, courts have in construing the agreements in totality held a vendor/contractor to be a developer within the meaning of s 3 of the 1966 Act if it can be shown that the vendor/contractor had developed, constructed or caused to be constructed in any manner whatsoever more than four units of housing accommodation or was involved in the sale of more than four lots of land or building lots with the

view of constructing more than four units of housing accommodation thereon. What more here where the agreement to sell the land and construct the housing unit is contained in a single contract.

[38] Counsel for the defendant argues that the defendant is not a developer within the meaning of s 3 of the 1966 Act for the following reasons:

(a) that the defendant does not possess the requisite license to conduct housing development as envisaged under s 5 of the 1966 Act;

(b) that the defendant did not at any material time represent that it was a housing developer;

(c) that the defendant had not engaged in the sale of more than four units of housing accommodation or building lots and that the plaintiffs have failed to adduce any evidence to support their contention that the defendant was engaged in the sale of more than four units of housing accommodation;

(d) that in a scheme of development where Schedule G of the 1989 Regulations applies, the developer decides the design and structure of buildings. However, in the present case the plaintiffs decide on the design and layout of the building and therefore it does not come within the ambit of the 1966 Act; and

(e) that the S & P though a single contract, in realty contains two separate agreements, one for the sale of the land and the other for the construction of house with separate schedules of payment and therefore is not a contract for the sale of a housing unit as envisaged in the 1966 Act.

[39] I am, with respect, unable to accept these arguments. Firstly, the defendant cannot use its own statutory contravention as a defence. All the facts and circumstances point to the irresistible conclusion that the defendant is a housing developer and the defendant ought to have applied for and obtained the necessary licenses and permits for them to sell the residential units to the public. Having failed to comply with the law, the defendant cannot now rely on its own transgression as a defence to the plaintiffs' claim.

[40] Secondly in respect of the defendant's contention that there are two separate agreements in the S & P, again I fail to see how this argument can be sustained. The defendant has agreed to sell the land which is registered in its name. The defendant has also agreed to build the bungalow on the said land. The plaintiff had entered into one agreement and not two separate agreements for the construction of the said bungalow. The two parts of the agreement are not distinct and cannot be severed and they are interconnected. Secondly in respect of the defendant's contention that there are two separate agreements in the S & P, again I fail to see how this argument can be sustained. The defendant

has agreed to sell the land which is registered in its name. The defendant has also agreed to build the bungalow on the said land. The plaintiffs had entered into one agreement and not two separate agreements for the construction of the said bungalow. The two parts of the agreement are not distinct and cannot be severed and they are interconnected.

[41] There is a subtle difference between the defendant's scheme as contained in the S & P and housing development schemes envisaged in the 1966 Act. The design and plan of the housing accommodations under the purview of the 1966 Act is decided by the developer and the building plans are approved by the relevant authorities before the housing accommodation is sold to the public. However, in this case, the plaintiffs were sold the land and given a choice of eight designs to choose from. This difference is now relied upon by the defendant to ground their defence that they are not developers within the meaning of the 1966 Act. Again, I am unable to accept this argument. The plaintiffs had no choice but to choose one of the eight designs. The plaintiffs were not given the choice of having their own bungalow design nor choosing their own consultants for the building of the bungalow. The architect, engineer and consultants were appointed by the defendant and the plans and designs were as stipulated by the defendant. If there were two contracts as alleged by the defendant, certainly the architect and the engineer would not be appointed by the defendant itself and the plaintiffs would be at liberty to make their own design and building plans (please see the case of *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285). Further, the plaintiffs could not purchase the land separately from the bungalow. To my mind this subtle difference was created by the defendant to clothe and guise the mechanism of sale in such manner so as to avoid the provisions and requirements of the 1966 Act. In short this is nothing but a scheme of avoidance. In fact such avoidance schemes would under the post 2002 amendment to s 3 of the 1966 Act be clearly caught out for 'the sale of more than four lots of land or building lots with a view of constructing more than four units of housing accommodation' would now come within the definition of 'housing development'.

[42] In this case the land owner and the contractor is the same entity/party. The agreement for land and bungalow had been entered into contemporaneously and there is no separate contract to appoint the defendant as a contractor to construct the bungalow. If the plaintiffs stop paying for the land, the construction of the bungalow will be stopped because the owner of the land is the defendant and not an independent third party. The plaintiffs would get to own the land and building only when the price of the land and building is paid. This is because the land and bungalow are not purchased separately and the price paid is for both the land and the bungalow and they cannot be severed. It is exactly for this purpose and to safeguard the interest of

purchasers that the 1966 Act was enacted (see the cases of *Energoprojek (M) Holdings v Public Prosecutor* [1998] 5 MLJ 40; *Khau Daw Yau v Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335; *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 and *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* where the courts have held that the object of the 1966 Act is to protect and safeguard the interest of the purchasers of houses in their relationship with housing developers).

[43] Therefore, my answer to question 1(a) above is in the affirmative. The defendant is a housing developer within the meaning of s 3 of the 1966 Act.

[44] Having answered the core issue, I shall now consider the answers to the other questions. It is trite law that if an entity is construed a housing developer within the definition of the 1966 Act, then the provisions of the 1966 Act and the Housing Developers (Control and Licensing) Regulations 1989 are applicable to it. Therefore, in the instant case the S & P must be read subject to the provisions of the 1966 Act and the Regulations thereunder. This was decided by the Federal Court in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* where Mohamed Azmi FJ speaking for the court held at p 290:

> From the agreement there can be no doubt that the appellants are clearly desirous of undertaking a housing development of more than four units of housing accommodation which will be erected with a view to selling the same to the respondents for the benefit of their members. This desire has subsequently crystallised into actual deed when they appointed themselves as the developer. *In the circumstances, the terms and conditions under the Housing Developers Rules 1970 and in particular Rule 12(1) must be read into the agreement as if they were part and parcel of what the parties have bargained for*. (Emphasis added.)

Further at the same page His Lordship held:

> A device to avoid possible consequence to statutory provision is not wrong if and only if it can be done legitimately. The attempt of the appellants to contract out of the Act is clearly not a device which can be described as legitimate. It is an open defiance of the Housing Developers legislation. Having regard to the policy and objective of Housing Developers Act 1966 and the 1970 Rules made thereunder the protection afforded by this legislation to house buyers is not merely a private right but a matter of public interest which Parliament has intended to protect from being bargained away or renounced in advance by an individual purchaser (see the principle enunciated by the House of Lords in *Johnson and another v Moreton* [1978] 3 All ER 37 at p 56 and applied by this court in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 at p 34. As stated by the learned judge at p 12 of his judgment:
>
> Now the insertion by the vendors of cll (1) and (2) of the draft building contract was at the heart of the problems in the case, the immediate and main causes of the refusal of the purchasers to approve and sign the draft building contract. From the

undoubtedly clear meaning of the words of the disputed clauses themselves, it was a clear attempt to get around the Act and the Rules and to remove any protection available under the Act or the Rules to the purchasers. The clauses were also inconsistent with the Act and the Rules. They were illegal or against the public policy, for to use the words of Lord Simon in *Johnson and another v Moreton* in connection with the attempted avoidance there of provisions of Agricultural Holdings Act 1948 of England, that to allow such clauses to stand, 'it would be to reinstate the mischief which the statute was designed to remedy and to render the statutory provisions a dead letter'.

[45] Therefore, applying the principles enunciated in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* my answer to question 1(b) above is also in the affirmative. The defendant as developer of the bungalow lots is bound by the 1966 Act and the S & P must be read and construed in accordance to the provisions of the said Act and its regulations. I agree with submissions made by counsel for plaintiffs that only terms and conditions that comply with the requirements of the 1966 Act and the Housing Developers (Control and Licensing) Rules 1970 may be inserted in any contract that is governed by the 1966 Act and the Rules. In *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 the Federal Court held that:

Thus it is clear that only terms and conditions designed to comply with the requirements of the rules that may be inserted in a contract of sale of land that is governed by the Act and Rules, and that on the contrary terms and conditions which purports to get round the Act and Rules so as to remove the protection of home buyers may not be so inserted.

[46] Also in *MK Retnam Holdings Sdn Bhd v Bhagat Singh* [1985] 2 MLJ 212 which involved a claim under the Housing Developers (Control and Licensing) Rules 1970 the then Supreme Court held that the validity of an agreement should be tested in the light of the said 1970 Rules and that the developer cannot 'contract out' of the provisions of the 1970 Rules.

[47] Therefore, any clause in the S & P which is inconsistent with the 1970 Rules and not drafted to comply with the requirements of the Rules is void. One of the terms contrary to the HDA and the Rules is that relating to payment as contained in the schedule to the S & P. The sale and purchase agreement (land and building) under Schedule G of the 1989 Regulations and reg 11(1) is applicable here. Therefore, the schedule of payment as contained in the Third Schedule of Schedule G should be adhered to by the defendant. Now, since the provisions of the S & P in relation to bearing of the costs of infrastructure and the schedule of payment in the S & P are inconsistent with Schedule G, the defendant cannot rely on the payment schedule clauses in the

S & P. The defendant can only make progressive claims as stipulated in Schedule G and such must be read into the S & P.

[48] The defendant is not entitled to any further progressive payment because until 2004 it had not complied with its obligations under the law. Although a long duration has lapsed, the defendant failed to complete the infrastructure. Even after a lapse of six years, the defendant had not completed the earthworks and had not commenced the construction of the bungalow. The defendant has in para 8 of its affidavit dated 17 August 2009 (encl 8) admitted that it had not commenced the construction of the said bungalow. Therefore, there is clear breach by the defendant of the obligations imposed by the 1966 Act, and which obligations must be read into the S & P.

[49] Therefore, my answer to question 1(c) is also in the affirmative.

[50] The answer to question 1(d) is that the defendant cannot terminate the agreement on the basis of the plaintiffs' non-payment of the progressive claim as demanded by the defendant for such progressive claim can only be made when the milestone events as stipulated in the Third Schedule of Schedule G have been met by the defendant. The defendant have not completed the infrastructure which according to the 1966 Act and the Rules must be first undertaken at the cost and expense of the defendant. The defendant cannot premise the termination of the S & P on its own default.

[51] In *Alghussein Establishment v Eton College* [1991] 1 All ER 267 (HL) the House of Lords reiterated the principle that the party in default cannot take advantage of its own wrong in the following words:

> The principle that a party in default under a contract cannot take advantage of his own wrong is in general a rule of construction rather than an absolute rule of law and morality, though there may exist situations, such as self induced frustration, where an absolute rule exists …

[52] That principle was applied by the Court of Appeal in *Penguasa (Jabatan Tanah & Survei, Bintulu) & Ors v Amit bin Salleh & Ors* [2008] 4 MLJ 567 where James Foong JCA (now FCJ) in delivering the judgment of the court held that:

> Quite apart from the construction of para 1(3)(b) of the First Schedule, there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take

advantage of his own breach. See *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *New Zealand Shipping Company, Limited v Societe Des Ateliers Et Chantiers De France* [1919] AC 1.

[53] On the basis of the foregoing I would in answer to questions 1(e) and (f) state that the notice of termination dated 11 August 2004 sent by the defendant is wrong in law and has no effect. The plaintiffs are entitled in law to seek specific performance of the S & P. I say this also in reference to cl 30 of the S & P which provides for severance. In the premise, to the extent that any of the S & P clauses are in contravention with the statute, they should not form part of the contract between the defendant and the plaintiffs and such clauses ought to be substituted with the statutorily sanctioned terms. Any of the terms, if void, can be struck out as not being applicable and substituted with the provisions as contained in the 1966 Act.

[54] The defendant had raised the issue of limitation. I am of the opinion that the plaintiffs' claim is not time barred. This case involves a contract for the sale of land together with construction of a building on the said land. Section 9 of the Limitation Act 1953 is applicable in this case. The plaintiffs' claim is not for damages alone. Their claim is, inter alia, for specific performance of the sale of land and therefore the limitation period is 12 years. Further, the defendant itself had demanded payment from the plaintiffs in July 2004 and threatened to infringe the plaintiffs' rights (exh YCH10 in encl 7) therefore the period of limitation would begin to run from that date and the filing of this claim in September 2008 is still within the 12 years limitation period (see *Nasri v Mesah* [1971] 1 MLJ 32; *Padang Serai Kilang Kayu Bhd v Khor Kia Fong & Ors* [1998] 1 MLJ 589 and *Tan Swee Lan v Engku Nik binti Engku Muda & Ors* [1973] 2 MLJ 187).

[55] Having answered the questions posed, I entered judgment in favour of the plaintiffs and made the following orders:

(a) a declaration that the defendant is a housing developer and is subject to the provisions of the Housing Development Act (Control and Licensing) Act 1966;

(b) a declaration that the defendant has breached the provisions in the Housing Development Act (Control and Licensing) Act 1966;

(c) specific performance of the sale and purchase agreement dated 29 December 1996 with the terms that are contrary to the provisions of the Housing Development Act (Control and Licensing) Act 1966 be substituted with the terms in Schedule G thereof;

(d) a declaration that the plaintiffs are entitled to liquidated and ascertained damages as provided in cl 20(2) of Schedule G to the Housing

A Development Act (Control and Licensing) Regulations 1989 from the date the bungalow ought to have been completed to the date of delivery of vacant possession of the land and building;

(e) that the senior assistant registrar assess the amount of damages to be paid by the defendant to the plaintiffs;

B

(f) that the caveat bearing Presentation No 11506/2004 dated 12 July 2004 on the said bungalow lot be extended till the full disposal of the suit;

(g) that the defendant pays interest on the damages assessed at the rate of 10%pa;

C

(h) that the prayers (g), (h), (i), (j) and (k) in encl 6 be dealt with after the assessment of damages; and

(i) the defendant pays the cost of this action.

D

Plaintiff's application allowed with costs.

Reported by Kohila Nesan

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